OA 9-1-87

IN THE SUPREME COURT OF FLORIDA

RAYMOND HAROLD TINGLEY,

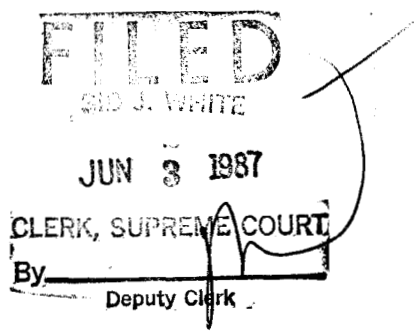
Petitioner,

v.

CASE NO. 69,651

STATE OF FLORIDA,

Respondent.



RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

In his brief on the merits, petitioner has presented three claims for relief, two in relation to issues on appeal which were summarily resolved by the district court. Respondent maintains that the decision below is correct in all respects and should be approved. The Fifth District correctly resolved petitioner's claims of error regarding the indictment's alleged duplicity and the alleged improper cross-examination of petitioner: in the later instance, petitioner opened the door to the line of inquiry subsequently attacked. The primary issue before this court is the district court's finding that the statement of particulars below did not impermissibly amend the indictment; respondent suggests that such finding is a correct statement of the law, but also argues that if it is in fact in conflict with certain other prior precedents, such prior precedents should be overruled, in that the holding of the district court below is consistent with more recent decisions of this court.

The district court was correct in finding that a statement of particulars is not a part of the charging document, and in further concluding that, unless time is a specific element of a certain crime, it is not a substantive, essential part of an indictment. Although there was a variance between the dates alleged in the indictment and those set forth in the formal statement of particulars, the state's evidence at trial was in accordance with the statement of particulars, and all dates proven were prior to the return of the indictment and within any applicable statute of limitations. The defense did not

demonstrate sufficient prejudice to warrant dismissal of the charges or reversal on appeal, and affirmance of petitioner's convictions was proper. Finally, respondent has in its Brief on the Merits respectfully renewed its jurisdictional challenge to the granting of the instant belated petition for writ of certiorari.

POINT I

THE DISTRICT COURT'S RESOLUTION OF THE ISSUE ON APPEAL REGARDING AN ALLEGED AMENDMENT OF THE INDICTMENT WAS CORRECT AND SHOULD BE APPROVED: THE STATE PROVED AT TRIAL THAT THE OFFENSES OCCURRED WITHIN THE TIME PERIODS SET FORTH IN THE STATEMENT OF PARTICULARS.

This case involves sexual batteries committed upon young children. Because the victims were young, both at the time of the offenses and at trial, they could not recollect with precision the dates upon which their trusted family friend had raped them. If the state made any mistake in this case, it was in originally alleging too restrictive a time frame for the incidents and also, perhaps, in not anticipating that the children would later change their minds as to when the offenses had actually occurred. As it was, the state conscientiously sought to keep the defense apprised of new developments in the case relating to the actual dates of the offenses, and respondent maintains that the Fifth District Court of Appeal correctly resolved this issue, and that the opinion below should be approved.

The offenses were originally charged, by information, to have been committed between June 1 and August 1, 1983, and a statement of particulars was filed to such effect (R 1081, 1159-61). Subsequently, the state chose to indict petitioner for the offenses, such manner of charging then being regarded as required, and, in the indictment, alleged that the crimes had

been committed between April 1, 1982 and September 30, 1982; ten days later, the state narrowed the time frame, in a statement of particulars, to between April 1 and September 20, 1982 (R 1082, 1162). Apparently after obtaining further information through deposition of the victims, the state filed an amended statement of particulars, on February 25, 1985, setting out the time of the offenses as between September 1, 1981 and September 20, 1982 (R 1163).

There matters rested until March 21, 1985, when petitioner orally moved to dismiss the charges, contending inter alia, that the state had impermissibly amended the indictment through the filing of an amended statement of particulars (R 1107-9). The motion was denied, but, upon motion by the defense, the state was directed to furnish a more definite statement of particulars as to the times involved: accordingly, on April 1, 1985, the state filed its final statement of particulars setting forth the time frames for the offenses as between September 1, 1981 and March 1, 1982, some six months. As petitioner concedes in his brief, the evidence presented at trial indicated that the sexual batteries in question occurred in October, November and around Christmas of 1981 (Brief of Petitioner at 11).

Petitioner argued below, and argues to this court, that his motion to dismiss should have been granted, in that the statements of particulars had the effect of impermissibly amending the indictment. Respondent disagrees, and suggests that the court below correctly rejected such argument in that, inter alia, a statement of particulars is not a part of the charging

document. See, Smith v. State, 93 Fla. 238, 112 So. 70 (1927). Additionally, the date of an offense is not a statutory element, see, State v. Bandi, 338 So.2d 75 (Fla. 4th DCA 1976), cert. denied, 344 So.2d 323 (Fla. 1977), and, as this court held in Sparks v. State, 273 So.2d 74 (Fla. 1973), the reason for requiring that a definite date be alleged is to show that the prosecution is not barred from the statute of limitations. The instant indictment sufficiently alleged all elements of the offense of sexual battery. Further, inasmuch as such offense, when the victim is below the age of twelve, is a capital felony, there in no statute of limitations. See § 775.15(1), Fla. Stat. (1981). Because the state alleged in the indictment actual and possible dates for the instant offenses, as opposed to an "impossible date", such as "September 31", compare, Straughter v. State, 83 Fla. 683, 92 So. 569 (1922), or a date sometime in the future, compare, Dickson v. State, 20 Fla. 800 (1884), no defect existed in the indictment sub judice so as to justify dismissal.

It is, of course, incontrovertible that the dates alleged in the indictment as the times of the instant offenses were not those proven at trial. Yet, such variance should not have served as any ground for dismissal, in that the dates proven were within the statute of limitations, and in that the proof at trial was within the time frame which was set out in the statement of particulars filed by the state, at the behest of the defense (R 1164). See, Hunter v. State, 83 Fla. 142, 95 So. 115 (1923); Sparks, supra; State v. Beamon, 298 So.2d 376 (Fla. 1974). Respondent maintains that the Fifth District was correct in

finding that reversal was not mandated, and, in relying upon the above precedents, concluding that a conviction, such as that sub judice, could be obtained for a crime even though there is a variance between the dates proven at trial and those alleged in the indictment, so long as the indictment and proofs show the crime was committed before the return date of the indictment and within any appropriate statute of limitations time period. Tingley at 1183.

The Fifth District also held that the better-reasoned rule appeared to be that unless time was a specific element of a certain crime, which it is not sub judice, it was not a substantive essential part of an indictment. This pronouncement, in accordance with State v. Bandi, supra, has apparently provoked the greatest ire from petitioner, who has alleged that it conflicts with such cases as Straughter, supra; Dickson, supra; and Pickeron v. State, **94** Fla. 268, 113 So. **707 (1927).** All such cases held that the allegation of the time or date of an offense was a matter of substance, and not of form. To the extent that there is conflict, respondent would maintain that the holding of the Fifth District should be approved, in that it is in accordance with other decisions of this court which have, in other contexts, liberalized certain common law-based requirements in pleadings.

Thus, in Sparks v. State, supra, this court expressly receded from its prior precedents, including Straughter and Pickeron, and held that an allegation that a crime had been committed "at or about" a certain time was sufficiently definite,

in the absence of a showing that time was material to the crime charged or that the accused was prejudiced thereby, given the availability of motions for statements of particulars or other discovery procedures. Justice Adkins expressly stated that the reason for the common law rule having ceased, it was discarded and previous holdings based upon it were overruled. Similarly, in Tucker v. State, 459 So.2d 306 (Fla. 1984), this court expressly receded from Black v. State, 385 So.2d 1372 (Fla. 1980), also relied upon by petitioner sub judice, and held that the failure of an indictment to allege venue was a matter of form and not of substance, and not one which would render the charging document void absent a showing of prejudice to defense. In reaching this conclusion, this court cited to Sparks and followed its rationale, holding that the requirement of an allegation of venue, set forth in Florida Rule of Criminal Procedure 3.140(d), must be read in para materia with Florida Rule of Criminal Procedure 3.140(o), which provides that no indictment or information should be dismissed **for any cause whatsoever** (emphasis in original) unless the court should be of the opinion that the indictment or information is so vague, indistinct or indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense. This court noted that the "missing" information concerning venue had been supplied the defense in a statement of particulars and that the defense had never claimed or established prejudice.

Thus, the real inquiry in this case should be the prejudice, or lack thereof, suffered the defense in this case. In its opinion, the Fifth District expressly stated,

> Tingley aruged that the state's final amendment of its bill of particulars which specified the time frame that criminal acts occurred as being six months prior to the time span set out in the indictment, constituted an impermissible amendment of the indictment, which made it void. Therefore the trial court should have granted his motion to dismiss. **He does not argue that the amendment occurred too close in time to the trial to prevent him from being able to effectively present a defense, or that it delayed, or hampered his defense at trial.** Tingley at **1182.**

Petitioner has not disputed this finding in his Brief on the Merits, and the record would not seem to support a finding of irretrievable prejudice sub judice. Compare, e.g., Stang v. State, **421 So.2d 147** (Fla. **1982).**

The defense in this case was not alibi, but flat denial of charges **(R 629-636; 658);** of course, caselaw has held that a defendant cannot make the exact date of the offense an element by presentation of an alibi defense. See, Bandi, supra. **As** early as February **25, 1985,** over one month prior to trial, the defense had notice that the sexual batteries could have occurred as early as September 1, **1981 (R 1163),** and it is also clear from defense counsel's remarks at the hearings of March **13** and **29, 1985,** that through deposition testimony of the victims, he was aware that one of the victims would state that an incident had occurred around Christmas time of **1981 (R 970, 1047);** similarly, it would

appear, from certain post-trial statements, that the prosecutor was not aware of the ''actual" dates that the girls would testify to until the day of trial itself **(R 1025)**. No attempt was made to continue the trial to produce any unexpectedly-necessary alibi witness, and petitioner's testimony at trial indicated a specific recall of the applicable time periods, including the identity of any potentially helpful witnesses **(R 629-635)**; it should be noted that Debra Hackett testified two days prior to petitioner and, at such time, identified the dates of the offenses as November and December of 1981 **(R 223-228)**, thus affording petitioner some opportunity to either contact witnesses and/or move for a continuance in order to do so.

Accordingly, respondent suggests that the Fifth District Court of Appeal correctly resolved the issue and, that the decision below should be approved. While the number of amended statements of particulars in this case is by all means greater than the norm, given the nature of the offenses presented, and the circumstances of the case, including the age of the victims, such was unavoidable; it must be noted that the existence of the crimes did not come to light until approximately three years after their occurrence. Whereas prejudice to the defense must be avoided whenever possible, prosecution of those who commit capital offenses cannot be avoided in every instance in which a child victim displays uncertainty as to the particulars of the offense. The basis for the instant charges was obviously plain to appellant - he was charged with raping two young children. Because there would seem to be no applicable statute of

limitation, see §775.15, the only purpose for allegation of a date in this case would be to benefit the defense. Such was done to the extent possible, and, to the extent necessary, this court should recede from any prior authority which would prevent approval of the decision below.

POINT II

THE DISTRICT COURT'S RESOLUTION OF THE ISSUE ON APPEAL, REGARDING ALLEGED DUPLICITY OF SEVERAL OF THE COUNTS OF THE INDICTMENT WAS CORRECT AND SHOULD BE APPROVED; THE INDICTMENT WAS NOT IMPERMISSIBLY VAGUE.

This court having granted review, petitioner has brought forth, in addition to his primary argument upon which conflict was alleged, two other points raised and rejected on appeal, such points summarily resolved by the district court as "without merit". Tingley at **1182**, n.2. Respondent suggests that the Fifth District's summary disposition of this argument was correct. While it is true that of the four counts, two each were identically worded, the plain meaning of such was to put petitioner on notice that he had sexually battered each victim twice. Petitioner's primary authority in support of his allegation of reversible error is another precedent of the Fifth District Court of Appeal, Collins v. State, **489** So.2d **188** (Fla. 5th DCA **1986)**. It is respectfully suggested that the district court below was in the best position to determine the application of its own precedents, especially when such argument was presented in a motion for rehearing ~~en banc~~, and the district court's resolution of this issue, as well as the opinion below as a whole, should be approved.

It must be noted that the charges ~~sub~~ judice allege all statutory elements of sexual battery, and even precisely state the specific nature of the sexual act performed. Compare, State v. Covington, **392** So.2d **1321 (Fla. 1981);** State v. Dilworth, **397**

So.2d 292 (Fla. 1981). There is no requirement that the state allege in the charging document every fact upon which it will rely to establish the statutory elements at trial. See, State v. Cauley, 213 So.2d 521 (Fla. 4th DCA 1968) (time and place of offense evidentiary facts which need not be alleged): Martinez v. State, 368 So.2d 338 (Fla. 1978); State v. Pajon, 374 So.2d 1070 (Fla. 3d DCA 1979). Inasmuch as all offenses sub judice apparently took place at the same location, i.e., petitioner's trailer, the only variable between them would be the timing. Each offense was alleged to have occurred within a certain time frame and, as noted in Point I, supra, the state filed statements of particulars attempting to set out such time frame in the most exact manner possible. The state cannot be required to allege a specific date when one is not known, see, Sparks v. State, supra, and by the number of counts, appellant was, as argued above, obviously on notice that he had committed at least two separate sexual acts upon each victim charged.

Inasmuch as this argument would seem, in essence, to be a restatement of that presented in Point I, respondent would renew its arguments presented therein as to the lack of prejudice suffered by petitioner. It is clear from the record that petitioner's counsel knew of at least one of the dates twenty days prior to trial (R 960, 1047), and that the state itself only learned of the other dates on the day trial began (R 1025). Accordingly, it would seem that petitioner was not inalterably prejudiced sub judice, and respondent sees no double jeopardy problem. To hold that dismissal was required in circumstances

such as presented in this case would in essence reward one who victimizes those of tender age or less than certain memory. The district court's resolution of this point on appeal was correct and the opinion below should be affirmed'.

'Additionally, outright dismissal of all four charges would not have been warranted, in that one count per victim would seem sufficiently clear. Petitioner received four concurrent life sentences, and the striking of any one, or pair, of them would seem of limited benefit. In any event, the evidence presented at trial supports the finding of four separate sexual batteries as alleged.

POINT III

THE DISTRICT COURT'S RESOLUTION OF THE ISSUE ON APPEAL REGARDING ALLEGED IMPROPER CROSS-EXAMINATION OF PETITIONER WAS CORRECT AND SHOULD BE APPROVED: PETITIONER OPENED THE DOOR TO THE LINE OF INQUIRY NOW UNDER ATTACK.

The second summarily dismissed appellate issue resurrected by petitioner is that relating to the state's cross-examination of him as to his relationships with young females. Petitioner continues to assert that such examination constituted improper character attack. Respondent continues to disagree, and suggests that petitioner himself opened the door to inquiry as to his "dating habits". The district court's summary resolution of this issue, as well as the opinion below, should be approved.

Petitioner was questioned on direct examination as to his dating habits, and was specifically asked by his own attorney "what age" of ladies he dated: petitioner responded that he dated those close to his own age, i.e., in their forties **(R 607-8).** On cross-examination, the prosecutor asked petitioner whether he had ever had any sexual attraction to the young victims in the case: defense counsel objected on the grounds of relevance **(R 672).** The objection was overruled, but renewed, and a proffer held outside the presence of the jury **(R 677-695).** During this proffer, the state questioned petitioner extensively concerning any relationship he might have had with certain other underaged females: petitioner categorically denied being sexually attracted to the minor females in question **(R 691).** Judge Antoon overruled defense objections that these matters were beyond the scope of

direct examination (R 696-7). Accordingly, the state cross-examined appellant as to his relationships with young females living in the trailer park, and in all instances, petitioner denied any sexual attraction thereto (R 699-702; 708).

It is well established that a trial judge has considerable discretion in his control of the scope of examination and cross-examination of witnesses, see, Oviatt v. state, 440 So.2d 646 (Fla. 5th DCA 1983), and that any ruling thereon will not be reversed unless an abuse of such discretion is shown. This court has similarly recognized that the parameters of full and fair cross-examination should always encompass subjects opened on direct examination. See, Jones v. State, 440 So.2d 570 (Fla. 1983). The state contends that petitioner opened the door to this field of inquiry by raising the subject of his romantic preference on direct examination. Compare, Squires v. State, 450 So.2d 208 (Fla. 1984); Blair v. State, 406 So.2d 1103 (Fla. 1981). In Squires, this court found that the defendant had "opened the door" to the admission of testimony concerning his shooting of persons other than the victim, by presenting testimony of his aversion to killing; in doing so, this court found Chat Squires had placed his character trait of "non-violence" at issue, thus allowing the state to rebut such, pursuant to section 90.404(1)(a), Florida Statutes (1981). Squires dictates affirmance sub judice.

Petitioner's raising of the subject of his dating habits cannot be regarded as accidental. Indeed, it must be seen as a conscious decision on his part to demonstrate to the jury that he

limited his "dating" to those of his own age, and that by inference, he could not be guilty of sexual assault upon victims over thirty years younger. Having made such representation, petitioner was subject to cross-examination upon it.

Petitioner has never claimed, nor could he, that the state, in its cross-examination was engaging in a fishing expedition. It is clear that the state possessed evidence to substantiate its claims, in that, despite petitioner's denials, rebuttal evidence was presented as to appellant's commission of a sexual battery upon his own niece, Laurie Moran, and as to certain statements made to his nephew, Leston Tingley. The court's ruling below that the defense had opened the door to this subject of inquiry is supported by the record, and was properly approved. Additionally, having interjected the initial subject into the trial, petitioner's objections on the grounds of relevancy would not seem to be well taken.

It is worth noting, of course, that sections 90.401 and 90.402, Florida Statutes (1981) provide that relevant evidence is that tending to prove or disprove a material fact, and that all such relevant evidence is admissible, except as provided by law. Although petitioner may be correct in his statements that sexual gratification per se is not an element of the offense, petitioner's relationship with young women close to the age of the victims in this case is not irrelevant. It is interesting to note that in a prosecution for lewd assault upon a child, the district court, in Coile v. State, 212 So.2d 94 (Fla. 3d DCA 1968), found admissible certain pornographic magazines found in

the defendant's car at the time of his arrest, on the grounds of relevancy. Apparently in Coile, as well as in the subsequent case of this court which relied upon it, Wilson v. State, 306 So.2d 513 (Fla. 1975), it was felt that evidence of a defendant's sexual interests was relevant where the prosecution was related to the culmination of such desires. Respondent suggests that the state's cross-examination of petitioner was directed towards proving material facts at issue, and touched upon only relevant matters, such that no error can be said to have occurred in reference to the trial judge's ruling thereon. The district court's resolution of this issue was correct, and the opinion below should be approved.

POINT IV

THIS COURT LACKS JURISDICTION TO REVIEW THE INSTANT CASE.

Respondent respectfully re-alleges the arguments contained in its Response to Petitioner's Motion to Reinstate, filed on or about December 11, 1986. Inasmuch as no defendant has the right to two appeals, see, Lake v. Lake, 103 So.2d 639 (Fla. 1958), respondent is respectfully at a loss to determine the legal or constitutional basis for any belated petition for review. While this court has granted such relief in the past, see, Pressley v. Wainwright, 367 So.2d 222 (Fla. 1979), Mansfield v. State, 368 So.2d 593 (Fla. 1979), over, it must be noted, vigorous dissents, the rationale underlying such decisions has never been made plain and, indeed, respondent would suggest, has, in fact, been superceded by this court's subsequent decision of State v. Meyer, 430 So.2d 440 (Fla. 1983). It would seem rather analomous that, in reversing the granting of a petition for writ of habeas corpus to a Florida prisoner, the United States Supreme Court, in Wainwright v. Torna, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982), has held that there could be no ineffective assistance of counsel in counsel's failure to file a timely petition for writ of certiorari in this court, in that a defendant had no constitutional right to counsel to pursue discretionary state appeal. Is Torna correct?

Respondent has no quarrel with this court's inherent equitable powers or its actions in the interests of justice, but would ask, as in State v. Meyer, that this court explicate the

precise procedural, and precedential basis for a belated petition for writ of certiorari, as such would undoubtedly be of benefit to the entire bar. To the extent that the question remains, at all, still open, respondent would maintain its contention that such belated petitions should be disallowed in that, to do otherwise, is to unnecessarily abrogate all jurisdictional time limits as set forth in the Rules of Appellate Procedure.

CONCLUSION

WHEREFORE, for the aforementioned reasons, respondent moves this honorable court approve the decision below in all respects, should respondent's renewed challenge of this court's jurisdiction prove unsuccessful.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on the Merits has been furnished by mail to Michael S. Becker, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014, this 2nd day of June, 1987.

Of Counsel